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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No. 88-2079

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF ILLINOIS,

Petitioner

vs

REGINALD MAHAFFEY,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Reginald Mahaffey, seeks leave to file his brief in opposition to certiorari to the Illinois Supreme Court, without prepayment of fees costs and to proceed in forma pauperis.

Respondent was represented in the Illinois Supreme Court by court-appointed counsel, the Office of the Public Defender of Cook County.

An affidavit is attached in support of this motion.

Respectfully submitted,

RANDOLPH N. STONE,
Public Defender of Cook County
200 W. Adams St.
4th Floor
Chicago, Illinois 60606
(312) 609-2040

By Donald S. Honchell
DONALD S. HONCHELL
Assistant Public Defender

Counsel for Respondent

No. 88-2079

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF ILLINOIS,

Petitioner

vs

REGINALD MAHAFFEY,

Respondent

AFFIDAVIT OF COUNSEL IN SUPPORT OF
RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

DONALD S. HONCHELL, being first duly sworn on oath, deposes and states

1. I am the assistant Cook County Public Defender representing respondent Reginald Mahaffey on appeal from his conviction and death sentence.

2. The Office of the Cook County Public Defender was appointed appellate counsel for respondent following his conviction and sentence of death.

3. Based on the appointment of this Office by the trial judge, I believe respondent is indigent and unable to prepay costs or fees or give security therefor.

4. Respondent seeks to file his brief in opposition to the State's Petition for a Writ of Certiorari without the need to pay filing fees and to proceed in forma pauperis. I offer this affidavit in support of that motion.

5. I have been unable to secure from respondent in time for filing his affidavit of indigency. Upon its receipt, I will forward it to the Clerk of this Court.

By Donald S. Honchell
DONALD S. HONCHELL
Assistant Cook County Public Defender

SUBSCRIBED and SWORN To Before Me this 27th day of July, 1989

"OFFICIAL SEAL"
Evelyn A. Lallas
Notary Public, State of Illinois
My Commission Expires June 30, 1991

Evelyn A. Lallas
Notary Public

No. 88-2079

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Respondent

CERTIFICATE OF SERVICE

TO: Hon. Cecil Partee
State's Attorney
309 Richard J. Daley Cntr
Chicago, Illinois
ATTN: RENE GOLDFARB

Hon. Neil Hartigan
Attorney General
100 W. Randolph St.
12th Floor
Chicago, Illinois

PLEASE TAKE NOTICE that Reginald Mahaffey has, on July 10, 1989, forwarded to the Clerk of the United States Supreme Court his Brief in Opposition to Certiorari, together with his Motion for Leave to Proceed in Forma Pauperis supported by affidavit.

ENCLOSED please find three copies of said Brief in Opposition and one copy of said Motion for Leave to Proceed in Forma Pauperis supported by affidavit.

RANDOLPH N. STONE
Public Defender of Cook County
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Chicago, Illinois 60606
(312) 609-2040

By Donald S. Honchell
DONALD S. HONCHELL
Assistant Public Defender

Counsel for Respondent

No. 88-2079

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF ILLINOIS,

Petitioner

vs

REGINALD MAHAFFEY,

Respondent

On Petition for A Writ of Certiorari
To The Supreme Court of Illinois

BRIEF IN OPPOSITION TO CERTIORARI

RANDOLPH N. STONE
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Chicago, Illinois 60606
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Counsel for Respondent

DONALD S. HONCHELL*
Assistant Public Defender

*Counsel of Record

QUESTION PRESENTED FOR REVIEW

Whether the Illinois Supreme Court's finding of prejudice in the failure to sever respondent's trial from the trial of his codefendant, who did not testify but whose confession implicating respondent was introduced in their joint jury trial, requires review by this Court.

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Respondent

BRIEF IN OPPOSITION TO CERTIORARI

JURISDICTION

The jurisdictional requisites are adequately stated in the petition. Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. sec. 1257(3).

STATEMENT OF THE CASE

Respondent and his codefendant brother were jointly charged by indictment filed in the circuit court of Cook County, Illinois. Prior to their trial, respondent sought a severance (R. 1045) on grounds he would be prejudiced in violation of the Bruton rule by presentation of the codefendant's statement implicating respondent if the codefendant did not testify. (R. 1045-6) The State resisted the severance motion on the basis of Parker v. Randolph because, in this case, both respondent and the codefendant had made interlocking statements. (R. 1047-55) In reply, defense counsel stressed respondent was contending the statements he

made were the product of police coercion, a different situation from that portrayed by the prosecutor. (R. 1055-6) In his ruling, the judge relied on Parker v. Randolph to deny the severance, finding under that case the statements of respondent and his codefendant to be interlocking and, so, no justification for a severance arose. (R. 1057-61) Counsel's subsequent request for separate juries for respondent and his codefendant was likewise denied. (R. 1062-5) Thereafter, during the joint jury trial, the prosecution presented both respondent's statement (R. 2896-2924) and that of the codefendant. (R. 2941-63) Details of the codefendant's statements implicated respondent as involved in the crime. The codefendant did not testify in his own behalf and, therefore, respondent could not cross-examine him on the allegations in his statements of respondent's participation in the offense.

Respondent testified at the joint trial, relating his statements resulted from being beaten by police officers (R. 3684-5, 3686-7, 3690-1, 3692) and explaining he had purchased the items found in his home belonging to the victims. (R. 3676, 3677, 3678-9, 3680, 3682-3, 3692-5) He further testified the contents of the confession had been supplied to him by authorities (R. 3684, 3692) after he had been informed on what had happened (R. 3672, 3686) and after he had been told what his statement was to be. (R. 3684, 3692)

Respondent was thereafter convicted of all but one charge against him (R. 3955-6) and faced a death penalty hearing. Following that hearing, respondent was sentenced to death (R. 4274) and appealed to the Illinois Supreme Court.

In ordering respondent be retried, the Illinois Supreme Court considered only the judge's constitutional error in denying respondent a severance as requested. (Op. at pp. 14-16; Appendix, pp. A16-19) It rejected the State's claim the codefendant's confession was independently admissible against respondent due to its interlocking nature with the statements of respondent. And it refused to find the constitutional error to be harmless and without influence on the jury's assessment of respondent's responsibility for the crimes. In doing so, it emphasized respondent had claimed his statements were coerced but his defense "of coercion was undercut by his inability to confront (codefendant) regarding the accusations contained in his statement". (Op., p. 16; Appendix, p. A19) On "this set of facts", respondent was held to be prejudiced by the constitutional error resulting from denial of severance and deserving of retrial. (Op. at p. 16; Appendix at p. A19) From this holding, petitioner now seeks leave to appeal to this Court.

REASONS FOR DENYING THE WRIT

THE ILLINOIS SUPREME COURT'S FINDING OF PREJUDICE IN THE FAILURE TO SEVER RESPONDENT'S TRIAL FROM THE TRIAL OF HIS CODEFENDANT, WHO DID NOT TESTIFY BUT WHOSE CONFESSION IMPLICATING RESPONDENT WAS INTRODUCED IN THEIR JOINT JURY TRIAL, IS A PERMISSIBLE RESULT WHICH DOES NOT REQUIRE REVIEW BY THIS COURT

Petitioner urges this Court to review the finding of the Illinois Supreme Court that, under the decision in Cruz v. New York, 481 U.S. 186 (1987), respondent deserves retrial since jointly tried with a codefendant whose confession implicated him in the crime but who did not testify so as to be exposed to cross-examination under respondent's constitutional right to confront witnesses against him. Petitioner does not deny that error in refusing a severance occurred and that respondent was deprived of that crucial constitutional right. Nor does it dispute that the error in the resulting trial matched the error recognized by this Court in Cruz. Nor does it argue that the Illinois Supreme Court failed to address the issue of harmless error which petitioner offered below as a rationalization to avoid the necessary retrial. It simply quarrels with the outcome of the Illinois Supreme Court's harmless error analysis. In doing so, it fails to offer compelling legal grounds for review of the order of retrial in this case.

Rather than focusing on the correct aspect of the harmless error principle, as revealed by the decisions of this Court and lower federal courts of review, petitioner addresses the evidence it believes proved respondent guilty of the charges. In fact, however, the proper test for harmless error is not "whether there was sufficient evidence on

which the (respondent) could have been convicted without the evidence complained of" but "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (Fahy v. Connecticut, 375 U.S. 85, 86-7 (1963); DeVine v. Solem, 815 F.2d 1205, 1207-8 (8th Cir. 1987)) Even in this Court's decision in Schneble v. Florida, 405 U.S. 427 (1972) relied on by petitioner, this Court phrased the harmless error test as whether "there is a reasonable possibility that the improperly admitted evidence contributed to the conviction." (405 U.S. at 432) Thus, the existence of the "reasonable possibility that error of constitutional dimension influenced the jury in reaching a verdict" requires retrial. (United States v. Argentine, 814 F.2d 783, 789 (1st Cir. 1987); see also Thompson v. Leeke, 756 F.2d 314, 316 (4th Cir. 1985); United States v. Porter, 764 F.2d 1, 7 (1st Cir. 1985); United States v. Christian, 571 F.2d 64, 69-70 (1st Cir. 1978))

This Court has been hesitant to heavily rely on purported "overwhelming evidence" to excuse trial errors found to deprive citizens of constitutional rights. In Harrington v. California, 395 U.S. 250, 254 (1969) (relied on by petitioner), this Court recognized it had admonished in Chapman v. California, 386 U.S. 18, 23 (1967) (also relied on by petitioner here) "against giving too much emphasis to 'overwhelming evidence' of guilt, stating that constitutional errors affecting the substantial rights of the aggrieved party could not be considered to be harmless."

In fact, having found constitutional error, State reviewing courts are expected, except in rare circumstances narrowly defined, to order trial anew. As this Court noted in United States v. Agurs, 427 U.S. 97, 112 (1976):

> "when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his 'conviction is sure that the error did not influence the jury or had but very slight effect.' (citation omitted)"

In this cause, the Illinois Supreme Court evaluated respondent's "set of facts" and found, as was its prerogative, the reasonable possibility the constitutional error affected respondent's rights. There has been no showing of a legal issue on which this Court should now intervene.

As the Illinois Supreme Court recognized, respondent in this case based his trial defense on, among other points, the claim his statements were coerced. When the codefendant's statements which implicated respondent were presented at trial and the codefendant did not testify to be examined on the voluntariness of those statements, the jury received unchallenged evidence of respondent's guilt to use to convict respondent. Thus, there is indeed, as the Illinois Supreme Court was authorized to find, the reasonable possibility the codefendant's confession contributed to respondent's conviction. For, even if the jury disbelieved respondent's statements as coerced and involuntary, it could base a conviction on the codefendant's declaration of respondent's participation, accusations respondent was powerless to weaken since the codefendant, source of the revelations, did not testify. It was only appropriate these circumstances yielded the conclusion error under Cruz v. New York was not harmless.

The harmless error standard was correctly applied to a situation such as this in United States ex rel Sanders v. Lane, 835 F.2d 1204 (7th Cir. 1987). There, the Court of Appeals stressed, citing Harrington v. California, that "whether Sanders could have been convicted on the basis of his own statement is not the target of our inquiry." Rather, the "harmless error analysis must focus on the potential contribution of the tainted evidence - Hunter's statement - to Sanders's conviction." (835 F.2d at 1207) Therefore, this Court should appreciate the Illinois Supreme Court here too ruled within its discretion, as the Seventh Circuit Court of Appeals did in Sanders. to determine the undisputed constitutional infraction contributed to respondent's criminal conviction.

Petitioner endeavors to recite how convincing was the evidence of respondent's guilt. (Pet., pp. 13-23) In fact, it merely reiterates the facts and circumstances known to the Illinois Supreme Court but there found unavailing. There need be no re-examination of these facts by this Court.

The mere similarity of respondent's statements to other prosecution evidence does not create harmless constitution error here as petitioner suggests. Respondent's statement was made several days after the commission of the crimes, at a time when the facts were known to authorities. As part of respondent's trial defense, respondent testified that officials told him what had happened in the case (R. 3672, 3686), told him what his statement was to be (R. 3684, 3692), and then supplied the information to him to repeat in the confession. (R. 3684, 3692) The credibility of this claim, of

course, rests with the trier of fact but the Illinois Supreme Court correctly recognized the simple resemblance of respondent's disclosures to State evidence does not automatically mean the use of the codefendant's untested accusations could not be found to be prejudicial here.

Moreover, the material in respondent's statement does not uniformly match every fact in the case. For example, the physical evidence indicated a detached telephone handset in the kitchen (R. 2258-9) which was not described by respondent. It included stab wounds to the female victim (R. 2322-3) which respondent never mentioned (relating solely a beating with a pistol (R. 2916, 2917)). The evidence included an empty gun holster near the male victim (R. 2266) which respondent did not establish. It further included shampoo bottles (R. 2277) the respondent never related had been moved during the entry. It included as well a baseball bat found in the kitchen (R. 2258) which the respondent never explained had been left there. It included also a bolster which bore blood stains and matched the color of the living room couch (R. 2274) but whose movement was never accounted for by respondent. And it included bloodstains in a bathroom sink (R. 2275) likewise never referred to by the respondent. These examples merely highlight the function of the Illinois Supreme Court to review the record and make its own determination, worthy of respect in this Court, on the presence (or, indeed, absence) of prejudicial error.

The remaining prosecution evidence does not significantly contribute to the conviction as petitioner believes so as to compel this Court to review the Illinois Supreme

Court's holding of harmful error. While a victim identified respondent at trial, he did not observe the intruders when first attacked (R. 2443), he viewed his assailant thereafter for some 10 seconds (R. 2442, 2444-5, 2451-2) while scared (R. 2442), upset and nervous (R. 2443), and he failed to indicate any identification of respondent as the offender when he viewed him in a lineup only days after the crime. (R. 2440-1, 3012, 3639) Moreover, the physician who treated this victim for his injuries testified the judgment and vision of the person so wounded would be impaired. (R. 2868, 2869, 2870)

Investigating officers failed to find physical evidence on the scene, such as fingerprints or bloodstains, which connected respondent to the crimes. (R. 2301, 2304, 2305, 2313, 2361, 2364-5, 3256-69, 3295, 3327-8, 3337) Nor did police find respondent's fingerprints in the victims' recovered auto. (R. 2502) And no evidence appeared respondent was seen at or in that vehicle. (R. 2501, 2502, 2503) Finally, respondent provided an explanation for his possession of the victims' property by identifying them as items he had purchased. (R. 3676, 3677, 3678-9, 3680, 3682-3, 3692-5) The Illinois Supreme Court thus correctly reasoned as it was entitled to do that respondent's conviction was influenced by the introduction of codefendant's confession. To properly conclude respondent's guilt must be fairly resolved by the trier of fact without this evidence since it could not assume the critical constitutional error under Cruz v. New York could be dismissed as harmless. No basis has been shown for disturbing that result.

Petitioner concludes respondent's confession contained the criminal elements charged (Pet., p. 21) and nothing in fact was added to the case by the codefendant's statements

(Pet., p. 22) so that the assumed per se rule of the Illinois Supreme Court used to order retrial here was incorrect. (Pet., p. 23) None of these claims warrants action by this Court to overturn the election of that court to find the unchallenged constitutional error to be prejudicial. Because the codefendant's confession assisted the State in overcoming respondent's trial defense that his statements had been coerced, much was indeed added to the prosecution's case against respondent by its use at the joint trial here. And there was no per se rule ever utilized here by the Illinois Supreme Court. Rather, that court considered the set of circumstances here and chose to find the State had not proven that the clear and undisputed constitutional error was in fact harmless. It is not necessary for this Court to now review that decision. Consequently, the petition seeking action by this Court should be denied.

CONCLUSION

For the reasons stated herein, respondent Reginald Mahaffey respectfully requests that this Honorable Court deny the Peition for a Writ of Certiorari.

Respectfully submitted,

RANDOLPH N. STONE
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(312) 609-2040

Counsel for Respondent

DONALD S. HONCHELL*
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office of the
COOK COUNTY PUBLIC DEFENDER
[illegible] • 47TH FLOOR • CHICAGO, ILLINOIS 60606 • (312) 609-2042
Randolph N. Stone • Public Defender

July 10, 1989

Hon. Joseph Spaniol, Jr.
Clerk of the Supreme Court
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

RECEIVED
JUL 31 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Dear Sir,

Enclosed please find the original and 3 copies of the Brief in Opposition to Certiorari to be filed in the cause of State of Illinois v. Reginald Mahaffey, No. 88-2079 now pending for disposition. I have also enclosed the certificate of service showing delivery of copies of the Brief in Opposition to opposing counsel for the State of Illinois (Attorney General and State's Attorney) and a motion for leave to proceed in forma pauperis supported by affidavit of counsel. As indicated in the affidavit, I have been unable to secure an affidavit from the respondent in time to include with the motion. However, I will endeavor to secure that affidavit as soon as possible and forward it to the Clerk's Office. I trust I will be able to file the Brief in Opposition without difficulty and I thank you for your attention to this matter. I also enclose an appearance form.

Sincerely,

Donald S. Honchell

DONALD S. HONCHELL
Assistant Public Defender

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 88-2079

State of Illinois (Petitioner or Appellant) vs. Reginald Mahaffey (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for Reginald Mahaffey

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States.

Signature Donald Sargent Honchell

(Type or print) Name DONALD SARGENT HONCHELL

☒ Mr. ☐ Ms. ☐ Mrs ☐ Miss

Firm Office of the Cook County Public Defender

Address 200 W. Adams St. 4th Floor

City & State Chicago, Illinois Zip 60606

Phone (312) 609-2040

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A